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Responsibility of international organizations

Comments and observations received from international organizations

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I. Introduction

1. At its fifty-fifth session, the International Law Commission asked the Secretariat to circulate, on an annual basis, the portions of its report relevant to the topic "Responsibility of international organizations" to international organizations for their comments.[1] Pursuant to that request, selected international organizations were invited to submit their comments on the relevant portions of the Commission's 2003, 2004 and 2005 reports.[2] Most recently, the Commission sought comments on chapter VI of its 2005 report[3] and on the issues of particular interest to it noted in paragraph 26 of the 2005 report.[4]

2. As at 17 March 2006, written comments had been received from the following four international organizations (dates of submission in parentheses): International Criminal Police Organization (31 January 2006), Organization for the Prohibition of Chemical Weapons (30 January 2006), World Bank (31 January 2006) and World Health Organization (21 February 2006). These comments are reproduced in section II below, in a topic-by-topic manner. Additional submissions received will be reproduced as addenda to the present report.

II. Comments and observations received from international organizations

A. General remarks

Organization for the Prohibition of Chemical Weapons

Regarding chapter VI, we find that it is quite comprehensive, thorough and balanced in its treatment of the wide range of issues that arise in the context of the international responsibility of international organizations. It goes a long way in clarifying and developing the state of international law on this topic.

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[1] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 52.

[2] The written comments of international organizations received prior to 9 May 2005 are contained in documents A/CN.4/545 and A/CN.4/556.

[3] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10).

[4] Paragraph 26 of the 2005 report reads as follows:

> 26. The next report of the Special Rapporteur will address questions relating to (1) circumstances precluding wrongfulness, and (2) responsibility of States for the internationally wrongful acts of international organizations. The Commission would welcome comments and observations relating to these questions, especially on the following points:
>
> (a) Article 16 of the articles on Responsibility of States for Internationally Wrongful Acts only considers the case that a State aids or assists another State in the commission of an internationally wrongful act. Should the Commission include in the draft articles on responsibility of international organizations also a provision concerning aid or assistance given by a State to an international organization in the commission of an internally wrongful act? Should the answer given to the question above also apply to the case of direction and control or coercion exercised by a State over the commission of an act of an international organization that would be wrongful but for the coercion?
>
> (b) Apart from the cases considered under (a), are there cases in which a State could be held responsible for the internationally wrongful act of an international organization of which it is a member?

World Health Organization

As far as chapter VI is concerned, the World Health Organization (WHO) notes that the Commission is proceeding consistent with its decision to base itself on the articles on responsibility of States for internationally wrongful acts,[5] adapted as appropriate. We agree in principle with the decision by the Commission to proceed in that manner in the absence of specific issues affecting the application to international organizations of the principles expressed in the aforementioned articles. At the same time, however, we share the concern expressed by a number of international organizations in their comments on the draft articles, when they underscore the fundamental differences between States and international organizations *qua* subjects of international law, and between international organizations. Such differences would warrant a careful assessment on the part of the Special Rapporteur and the Commission as to solutions which might turn out to be counterproductive for the interests of international organizations. The scarcity of available practice, and the evidently less settled status of international law in this area as compared to that of responsibility of States, make the overall situation complex and delicate. This is particularly evident for provisions such as draft articles 12 to 14, which touch on issues of particular political sensitivity in the relations between an international organization and its member States.

In view of the foregoing considerations, we would recommend regular consultations between the Commission and the Special Rapporteur, on the one hand, and interested international organizations, on the other hand, in the course of the process leading to the adoption of further draft articles. We welcome, in this connection, the fact that the responsibility of international organizations will be one of the items on the agenda of the forthcoming meeting of legal advisers of the United Nations system and that the Special Rapporteur has accepted to participate in that meeting.

As WHO has noted in a previous communication, it does not have any practice concerning claims of breaches by it of its international obligations; its replies to the queries raised by the Commission, therefore, can only be of a speculative nature, or based once again on analogies with the articles on the responsibility of States. While the secretariat of WHO is keen to contribute to the further work of the Commission on this topic, it may not always be possible for it to take a formal position on legal questions of a general nature on which it has no practice and which may have policy implications. Consequently, the fact that WHO may not reply to some or all of the queries raised by the Commission should not be seen as either indifference on its part or acquiescence to the approach being followed by it.

B. Draft article 8 — Existence of a breach of an international obligation

3. Draft article 8, as provisionally adopted by the Commission at its fifty-seventh session, reads as follows:

[5] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 76.

Article 8
Existence of a breach of an international obligation

1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of its origin and character.

2. Paragraph 1 also applies to the breach of an obligation under international law established by a rule of the international organization.[6]

World Health Organization

Coming now to some of the articles provisionally adopted by the Commission, we concur with the formulation of paragraph 2 of article 8 concerning the relevance of the rules of an organization in the determination of the existence of a breach of its international obligations. As noted in the commentary to article 8 and as expressed in the comments of some organizations, the question of the legal nature of the rules of an organization (as defined in draft article 4) and their relation to international law is complex and does not lend itself to wholesale solutions. WHO would generally support the view that whether or not obligations arising for an organization under its rules may be considered international obligations depends on the source and subject matter of the rules concerned. Whereas there is no doubt that obligations arising directly under the constituent instrument of an organization vis-à-vis its member States are of an international nature, the same cannot be said in our view with regard to obligations arising between an organization and its officials under the staff regulations and rules. The solution adopted in paragraph 2 of article 8 seems therefore an acceptable compromise on this point.

C. Draft article 15 — Decisions, recommendations and authorizations addressed to member States and international organizations

4. Draft article 15, as provisionally adopted by the Commission at its fifty-seventh session, reads as follows:

Article 15
Decisions, recommendations and authorizations addressed to member States and international organizations

1. An international organization incurs international responsibility if it adopts a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization.

2. An international organization incurs international responsibility if:

(a) It authorizes a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the

[6] Ibid., *Sixtieth Session, Supplement No. 10* (A/60/10), para. 205.

former organization, or recommends that a member State or international organization commit such an act; and

(b) That State or international organization commits the act in question in reliance on that authorization or recommendation.

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member State or international organization to which the decision, authorization or recommendation is directed.[7]

International Criminal Police Organization

The International Criminal Police Organization (Interpol) General Secretariat wishes to reiterate its concerns and reservations with regard to the rule reflected in draft article 15, particularly as far as it concerns the responsibility of international organizations for acts of their members committed in reliance on a recommendation of an organization. The General Secretariat is not aware of precedent or practice involving an international organization consciously ordering or recommending its members to commit an internationally wrongful act, on which the rule proposed by the Commission could be founded. The conceptual underpinning of the proposed rule is also unclear, especially with regard to acts committed in reliance on mere recommendations of international organizations. In the case of Interpol, this is further complicated by the fact that article 9 of the Constitution expressly states that "Members shall do all within their power, in so far as compatible with their own obligations, to carry out decisions of the General Assembly".

Moreover, the formulation of draft article 15 suggests that the proposed rule would apply even if a recommendation concerns a matter which the international organization is not competent to deal with. It would be difficult for Interpol to accept such effect, given that article 8 (g) of the Interpol Constitution expressly restricts the recommendatory powers of the General Assembly to matters with which the organization is competent to deal.

World Health Organization

Draft article 15 deals with an issue of potential political sensitivity for international organizations, in particular for a technical agency such as WHO whose normative functions mainly consist of recommendations addressed either by the governing bodies of the organization or by the secretariat to member States. We appreciate the point, expressed in paragraph 1 of the commentary to the article concerned,[8] that an international organization should not be allowed to "outsource" actions that would be unlawful if taken directly by that organization. At the same time, WHO finds it hard to envisage in practice a situation that would fall under paragraph 2 of draft article 15, in particular in cases in which the conduct of the State or international organization to which an authorization or recommendation is addressed is not wrongful, as provided in paragraph 3 of the same article. Moreover, we note the statements reproduced in the report of the Special Rapporteur and the position taken by some international organizations in their comments to the effect that an international organization should not be considered responsible for acts undertaken by its members on the basis of an authorization or recommendation

[7] Ibid.

[8] Ibid., para. 206.

issued by the organization. In this connection, therefore, it would be helpful if the commentary to draft article 15 could be revised in due course to offer practical examples of the situations that the Commission seems to have in mind.

D. Circumstances precluding wrongfulness — general considerations

International Criminal Police Organization

The issue of circumstances precluding the wrongfulness of the acts of international organizations has been addressed by international administrative tribunals. The case law of those tribunals confirms that circumstances precluding wrongfulness are inherent in the law of responsibility for the breach of international obligations. Therefore, the topic is rightfully considered for inclusion in the draft articles on responsibility of international organizations for internationally wrongful acts.

Nevertheless, it might be necessary to clarify the use of terms and reflect on the question whether the distinctions as made in the corresponding provisions of the Commission's articles on State responsibility, i.e. consent, countermeasures, *force majeure*, distress, necessity and compliance with peremptory norms, are fully transferable to the responsibility of international organizations. In this context, the Interpol General Secretariat wishes to mention three cases decided by international administrative tribunals.

1. Organization of American States Administrative Tribunal, Judgment No. 24[9]

This case concerned a decision of the Organization of American States (OAS) to relieve the complainant of the post of Director of the Office of the General Secretariat and terminate his contract with the organization, allegedly for reasons of *force majeure* said to be known to the complainant but beyond the control of the organization. In rejecting the argument, the tribunal adhered to a restrictive notion of *force majeure*, and at the same time suggested that impossibility can also be a circumstance precluding wrongfulness:

> The Tribunal considers that in the present case there is no *force majeure* that would have made it impossible for the General Secretariat to fulfil the fixed-term contract, since it is much-explored law that by *force majeure* is meant an irresistible happening of nature. Nor is there any impossibility of fulfilling the contract for reasons outside the General Secretariat.

2. International Labour Organization Administrative Tribunal, Judgment No. 339[10]

In this case, the International Labour Organization Administrative Tribunal answered, *obiter dicta*, the question whether financial distress caused by reasons other than failure of countries to honour their membership dues to an organization can serve as a circumstance that precludes wrongfulness. The complainant was offered and accepted a "consultancy" contract with the organization in question. The project for which the complainant was to work was a United Nations Development

[9] The judgments of the OAS Administrative Tribunal can be accessed at www.oas.org/tribadem/tribadeng.htm.

[10] The judgments of the International Labour Organization Administrative Tribunal can be accessed at www.ilo.org/dyn/triblex/triblex_browse.home.

Programme (UNDP) project. UNDP ran into financial difficulties and had to suspend or cancel credits. The credits for the complainant's consultancy were cut off. The organization therefore told him that it had cancelled the offer of appointment. The Administrative Tribunal sided with the complainant:

> It is possible that an event such as the withdrawal of the UNDP finance might be shown as having such a crippling effect on the organization's ability to continue with the contract as to constitute reasonable grounds for its termination. But there is no material in the dossier which would enable the Tribunal to reach any conclusion about the effect of the withdrawal. There is no reference to UNDP in the contract. Presumably it was to pay the complainant's salary in whole or in part, but there is no adequate statement anywhere in the dossier of what the financial arrangements were with the Food and Agriculture Organization of the United Nations (FAO) or of how they affected the organization's ability to finance its contracts. The only communications disclosed from UNDP are two cables. The first, dated 22 January 1976, states that UNDP is "unable to authorize" three months of the proposed consultancy and suggests another source. The second, dated 29 January, approves one proposed consultancy but is "unable to approve" the remaining three months of the complainant's consultancy. There is nothing in this to connect the disapprovals with any financial situation. The decision of FAO to cancel its arrangements with the complainant was not taken until 17 February; the delay suggests that there may have been other factors to consider. Finally, there is a great difference between stopping recruitments and terminating prematurely contracts which have already been concluded. Presumably on the information given to it by the organization, UNDP believed that in the complainant's case all it was doing was to stop additional recruitment; it does not follow that it would have acted in the same way in the case of a concluded contract.

3. International Labour Organization Administrative Tribunal, Judgement No. 2183

In this case, the complainant was on sick leave for a long time and nobody could consult her e-mails. Her immediate supervisor asked for access to her computer account, consulted her e-mails and reported that he had separated the professional messages from the private messages, which had been stored in a new file. Having heard about what she described as an "e-mail violation", the complainant complained to the Director of Administration. The complainant was not satisfied with the reply received and she disputed its content. The organization countered with the plea of necessity. The Administrative Tribunal rejected the claim by applying the following principles to the facts of the case:

> Firstly, the organization's rules which applied at the relevant time indicate that the computing facilities, including networks, must not be used other than for their intended purpose in connection with the organization's official programme of work, unless subject to a special agreement. However, the organization acknowledges that, like other organizations, it tolerates the use of e-mail addresses for private purposes within appropriate limits, and provided that this does not adversely affect the operation of the organization. Secondly, the principle of the confidentiality of private messages stored in a professional e-mail account must be observed. Thirdly, in the event that access to an e-mail

> account becomes necessary for reasons of urgency or because of the prolonged absence of the account holder, it must be possible for organizations to open the account using appropriate technical safeguards. That state of necessity, justifying access to data which may be confidential, must be assessed with the utmost care.

It must be noted that although the tribunal utilized the term "state of necessity", it could be argued that the test set forth in article 16 (a) of the Commission's articles on State responsibility was not met.

E. Circumstances precluding wrongfulness — necessity

5. In its 2004 report the Commission posed the following question regarding necessity:

> (b) Among the circumstances precluding wrongfulness, article 25 on responsibility of States for internationally wrongful acts refers to "necessity", which may be invoked by a State under certain conditions: first of all, that the "act not in conformity with an international obligation of that State [...] is the only way for the State to safeguard an essential interest against a grave and imminent peril". Could necessity be invoked by an international organization under a similar set of circumstances?[11]

World Bank

In the Commission's draft articles on State responsibility, necessity is acknowledged as a circumstance precluding wrongfulness, but only in exceptional cases and within stringent limits: pursuant to draft article 25, a State may not invoke necessity unless (a) it is the only way to safeguard an essential interest against a grave and imminent peril, and (b) it does not seriously impair an essential interest of the State or States towards which the obligation that is breached exists, or of the international community as a whole. Moreover, necessity may not be invoked by a State that has contributed to the situation of necessity, or in breach of an obligation excluding the possibility of invoking necessity.

Within these strict limits, it is difficult to see why an international organization too may not invoke necessity. One of the fundamental prerequisites for invoking necessity is the safeguard of an "essential interest". As international organizations have a separate legal personality from that of their member States, and are therefore separate legal subjects, it cannot be denied, a priori, that they too have essential interests to safeguard in accordance with their constituent instruments.

The relevance of exceptional circumstances in World Bank operations is confirmed by certain clauses in the General Conditions, which are incorporated in World Bank financial agreements and to which reference can be made here by way of analogy. Section 6.02 (e) of the General Conditions applicable to Loan and Guarantee Agreements for Single Currency Loans (dated 30 May 1995, as amended through 1 May 2004) provides for the possibility that the right of a borrower to make withdrawals from the Loan Account be suspended in whole or in part if:

[11] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 25.

(c) As a result of events which have occurred after the date of the Loan Agreement, an extraordinary situation shall have arisen which shall make it improbable that the Project can be carried out or that the Borrower or the Guarantor will be able to perform its obligations under the Loan Agreement or the Guarantee Agreement.

Likewise, section 6.02 (k) of the General Conditions applicable to Loan and Guarantee Agreements for Fixed-Spread Loans (dated 1 September 1999, as amended through 1 May 2004) provides for the possibility of suspension if:

> an extraordinary situation shall have arisen under which any further withdrawals under the Loan would be inconsistent with the provisions of Article III, Section 3 of the Bank's Articles of Agreement.[12]

Finally, regarding the peril that justifies the invocation of necessity, the International Court of Justice, in the *Gabčíkovo-Nagymaros* case, observed that peril has to be objectively established, and not merely apprehended as possible, and that a "peril" appearing in the long term might be held to be "imminent" as soon as it is established.[13] This latter clarification is of the utmost importance to World Bank practice, in which imminent perils may arise within the context of long-term financial commitments. Therefore, in our view, this clarification provided by the International Court of Justice should be reflected either in the text of the relevant article that will be adopted by the Commission or, at least, in the commentary accompanying it.

In consideration of the foregoing, our view is that the Commission's project:

(a) Should indicate that necessity, as one of the circumstances precluding wrongfulness, may be invoked by an international organization under similar circumstances to those in which a State may invoke necessity to safeguard an essential interest against a grave and imminent peril; and

(b) Should expressly state, preferably in the text of the relevant article, or at least in the commentary accompanying it, that a peril appearing in the long term might be held to be imminent as soon as it is established.

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[12] Article III, section 3, reads as follows: "The total amount outstanding of guarantees, participations in loans and direct loans made by the Bank shall not be increased at any time, if by such increase the total would exceed one hundred percent of the unimpaired subscribed capital, reserves and surplus of the Bank".

[13] *Gabčíkovo-Nagymaros (Hungary/Slovakia), Judgment, I.C.J. Reports*, 1997, para. 56: "The word 'peril' certainly evokes the idea of 'risk'; that is precisely what distinguishes 'peril' from material damage. But a state of necessity could not exist without a 'peril' duly established at the relevant point in time; the mere apprehension of a possible 'peril' could not suffice in that respect. It could moreover hardly be otherwise, when the 'peril' constituting the state of necessity has at the same time to be 'grave' and 'imminent'. 'Imminence' is synonymous with 'immediacy' or 'proximity' and goes far beyond the concept of 'possibility'. As the International Law Commission emphasized in its commentary, the 'extremely grave and imminent' peril must 'have been a threat to the interest at the actual time' ... That does not exclude, in the view of the Court, that a 'peril' appearing in the long term might be held to be 'imminent' as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable."

F. Responsibility of States for the internationally wrongful acts of international organizations

International Criminal Police Organization

Regarding the issue of responsibility of States for the wrongful acts of international organizations, it would appear that — unless the Commission intends at some point to integrate the various areas of responsibility for internationally wrongful acts into one comprehensive framework — one would be venturing into the area of State responsibility rather than the responsibility of international organizations. The questions posed by the Commission reveal one consequence of the fact that international responsibility is commonly considered in relation to States as normal subjects of international law. The move to also study the responsibility of international organizations reflects the concomitant recognition of international organizations as subjects of international law. However, international responsibility is in essence a broader question inseparable from the question of who is the party that owes the international legal obligation that was breached. In other words, internationally wrongful acts of any subject (whether a State, an international organization, a natural person or a national legal person) pertain to the law of international responsibility. Thus, both theory and experience indicate that the question is broader than only the responsibility of States for the wrongful acts of international organizations. Consequently, singling out the responsibility of States for the wrongful acts of international organizations could prove to be unjustifiably selective.

The above becomes more clear when dealing with the two specific questions posed, namely (a) whether the draft articles should contain a provision on aid and assistance given by a State to an international organization in the commission of an internationally wrongful act, and (b) whether there are cases in which a State could be held responsible for the internationally wrongful act of an international organization of which it is a member. As will be explained below, those questions should be dealt with in the articles on State responsibility.

(a) Aiding, assisting, directing and controlling

It is submitted that articles 16 and 17 of the articles on responsibility of States for internationally wrongful acts are unduly restrictive in their scope. They only deal with cases of aiding and assisting another State, and directing and controlling another State in the commission of an internationally wrongful act, but not with cases of aiding and assisting in the commission of internationally wrongful acts by other subjects of international law, such as an international organization. Had articles 16 and 17 not been that restrictive, there would not have been a need to raise the question of whether the articles on the responsibility of international organizations should contain a provision on aid and assistance given by a State to an international organization in the commission of an internationally wrongful act, or directing and controlling an international organization in the commission of an internationally wrongful act. Given the restrictive formulations in articles 16 and 17, it would seem that the question posed by the Commission is one of the questions concerning State responsibility, which, by virtue of article 56 of the articles on responsibility of States for internationally wrongful acts, continues to be governed by the applicable rules of international law. In this regard, it is recalled that the general formulation used by the Permanent Court of International Justice in the

Factory at Chorzów (Jurisdiction) case (1927),[14] is wide enough to cover cases of aiding and assisting or directing and controlling another subject of international law in the commission of an internationally wrongful act.

Hence, only if there exists no rule of general international law which holds that a State is responsible in cases of aiding and assisting or directing and controlling an international organization in the commission of an internationally wrongful act — which is not obvious — would there be a gap that needs to be filled through progressive development. But even then, it is not believed that the articles on the responsibility of international organizations would be the right place to do so. One could argue against limiting the responsibility of international organizations to aiding/controlling/coercing a State or another international organization in their breach of international law (see articles 12-14 of the draft).

(b) Member's responsibility

To a certain extent, the foregoing discussion partly answers the question whether there are cases in which a State could be held responsible for the internationally wrongful act of an international organization of which it is a member. It is not clear what cases could be contemplated that are not already covered. One of the functions of article 57 of the articles on responsibility of States for internationally wrongful acts is to exclude the question of the responsibility of any State for the conduct of an international organization from the scope of the articles. However, that provision does not exclude from the scope of the articles any question of responsibility of a State for its own conduct, that is, for conduct attributable to a State under chapter II of Part One of the articles on responsibility of States for internationally wrongful acts. The declared intention of the Commission under article 57 is to exclude these issues — although they formally fall within the scope of the articles on responsibility of States for internationally wrongful acts — since they concern questions of State responsibility akin to those dealt with in chapter IV of Part One. Therefore, the scope of article 57 is narrow and covers only what is sometimes referred to as derivative or secondary liability of member States for acts or debts of an international organization.[15]

As previously observed by the Interpol General Secretariat (A/CN.4/556, p. 41), the situation that might arise in case of the financial abandonment of an organization by its members calls for reflection in this context. It is recalled that in the *Effects of Awards* case (1954),[16] the International Court of Justice clarified that the function of approving the budget does not mean that the plenary organ of an international organization has an absolute power to approve or disapprove the expenditure proposed to it, for some part of that expenditure arises out of obligations already incurred by the organization, and to this extent the plenary organ has no alternative but to honour those engagements. However, is the refusal of members to enable the organization to honour its engagements not covered by the provision regarding coercion? The case of the International Tin Council constitutes a singular case where members simply abandoned the organization, leading to defaults and its eventual demise. Conceivably, a case of such financial abandonment

[14] 1927 *P.C.I.J. Series A*, No. 17.

[15] Commentaries on draft article 57 in J. Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge, 2002), p. 311.

[16] *I.C.J. Reports*, 1954, p. 54.

could be a case that would trigger the responsibilities of members under a rule akin to article 18 of the articles on responsibility of States for internationally wrongful acts. Beyond this example, it remains unclear what should be covered under the heading of "responsibility of a State for internationally wrongful acts of an international organization".

(i) *Lex specialis*

It would seem that article 55 of the articles on responsibility of States for internationally wrongful acts and article 74, paragraph 3 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations already cover the *lex specialis* cases where the rules of an international organization specifically provide for the responsibility of a State for internationally wrongful acts of an international organization of which it is a member. That would be the case if either the constituent instrument or another rule of the organization prescribes the derivative or secondary liability of the members of the organization for the acts or debts of the organization. That is, for instance, the case with article 300 (7) of the Treaty establishing the European Community (consolidated version, 2002),[17] which provides that agreements concluded by the European Community under the conditions set out in that article shall be binding on the institutions of the Community and on member States.

(ii) *Pactum tertiis*

Similarly, where an internationally wrongful act of an international organization results from the breach of an obligation imposed by an international agreement between the organization and a State or another international organization, it would follow from articles 34 and 35 of the 1986 Vienna Convention that only if the member countries of the wrongdoing organization have accepted to guarantee the discharge of the obligations under the agreement would they accrue responsibility for the breach of obligation by the organization.

(iii) *Lack of funding*

One of the situations invoked in the doctrine justifying the responsibility of States for the wrongful acts of international organizations concerns the cases where an organization fails to meet its obligations because of lack of funding. Leaving aside the cases of financial obligations not governed by international law, there is some authority in the case law of the international courts and tribunals that implies that those cases are covered by the circumstances precluding wrongfulness.

Two judgments of international administrative tribunals illustrate this point. One concerns the situation that can arise when an organization faces financial difficulties resulting from extraneous factors, while the other concerns a situation caused by members' failure to meet their financial obligations to the organization.

As already mentioned above, in its Judgment No. 339, the International Labour Organization Administrative Tribunal answered positively the question whether financial distress caused by reasons other than failure of countries to honour their membership dues to an organization can serve as a circumstance that precludes wrongfulness. However, according to the OAS Administrative Tribunal, Judgment

[17] *Official Journal of the European Communities*, vol. 45, No. C325 (24 December 2002), p. 35.

No. 124, when the cause is not extraneous but relates to the failure of members to meet their financial obligations, financial distress only leads to temporary impossibility of performance:

> The Tribunal holds that the organization has an obligation to pay but recognizes, at the same time, that *exceptional circumstances or force majeure* may temporarily prevent it from meeting its legal obligation.
>
> Bearing that reality in mind, the legal tenet being applied here is that obligations are extinguished only in the manner provided for by the internal legal system of the organization and by general principles of law such as waiver, payment, expiration and indemnification, and not in any other way such as the non-payment of quotas by the member States.
>
> Putting together both aspects — the non-payment of quotas by the member States and the legally binding nature of the obligation — the organization must open a special account on behalf of the General Secretariat staff, managed by and under the responsibility of the Treasurer, to set up a reserve for the employees, which shall be used solely and exclusively for paying any benefits owed by the organization to its staff. The reserve shall be carried on the books and shall be paid out as the member States *become current in meeting* their financial obligations to the organization by paying their quotas. (See articles 6 and 54 of the charter and resolution AG/RES. 900 (XVII-O/87), in which the General Assembly stated that "payment of quotas and contributions is a legal commitment of the member States to the Organization of American States", see also "The mandatory nature of the General Assembly resolutions setting the quotas that the member States are to contribute to fund the OAS", document OEA/Ser.G/CP/doc.1907/88 of 7 July 1988, pp. 1-2, prepared by the General Secretariat of OAS and placed before the Permanent Council of the Organization. See also the Advisory Opinion "Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)" dated 20 July 1962 (*I.C.J. Reports*, 1962) of the International Court of Justice, cited also by the General Secretariat of OAS in the aforesaid document, in which the Court upheld the binding nature of quota determinations made by the United Nations General Assembly, and a memorandum from the United Nations Legal Counsel dated 7 August 1978, in which he maintained that Article 17 of the United Nations Charter "imposes on members the legal obligation to pay the quotas set for them by the General Assembly" (*Digest of United States Practice in International Law*, pp. 225-226).)

The latter judgment seems to suggest that, since under international law States that are members of an international organization are bound to pay the contributions assessed by the competent body of the organization, it is incumbent upon the organization to take measures to deal with situations where members are not current with their dues. However, the legal obligation inherent in membership in an international organization to pay the quotas set by the plenary organ remains *res inter alios acta*, and does not seem to amount to what is referred to as derivative or secondary liability of member States for acts or debts of an international organization.

(iv) Abandoning the general principles[7]

As stated above, it remains unclear what should be covered under the heading of responsibility of a State for internationally wrongful acts of an international organization. Two other possibilities can be contemplated.

Firstly, that as a matter of positive general international law the responsibility of a State for internationally wrongful acts of an international organization derogates from the general principles set forth in chapters I and III of the articles on responsibility of States for internationally wrongful acts. Article 1 states that every internationally wrongful act of a State entails the responsibility of that State. Moreover, article 13 states that an act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs. However, there exists no international practice that would support a finding that a derogating customary rule of international law has evolved, entailing that a State is also responsible for internationally wrongful acts of an international organization of which it is a member. Even a most favourable reading of the Westland Helicopters/Arab Organization for Industrialization (AOI) arbitration award (1995), would still lead to the conclusion that the tribunal essentially deemed that the acts of AOI were attributable to the member States because AOI was substantially indistinguishable from them. Thus, apart from the fact that subsequently the Swiss judiciary rightfully annulled the award, the Westland Helicopters/AOI arbitration award in fact constitutes an application of the general principles set forth in chapter I of the articles on responsibility of States for internationally wrongful acts.

Secondly, it might be that as a matter of *lege ferenda*, there should be a rule derogating from the general principles set forth in chapters I and III of the articles on responsibility of States for internationally wrongful acts. However, unlike domestic law systems, the international community has neither legal and administrative process of incorporation nor any common standards for international organizations. Thus, embarking on such an exercise will require dealing with the plethora of questions emanating from the diversity of international organizations. To mention just a few: should multilateral banking institutions be treated in the same way as non-banking international organizations? Should it matter that some organizations are integrationist and others not? Should a distinction be made between the types of obligations? Do the internal control mechanisms of all international organizations conform with the conditions that would allow such a rule to operate?

Organization for the Prohibition of Chemical Weapons

In chapter III.C of its 2005 report, the Commission has invited comments and observation on three issues.

(a) Aiding or assisting, directing and controlling or coercing

The first question (paragraph 26 (a)) is whether the Commission should include in the draft articles on responsibility of international organizations a provision concerning aid or assistance given by a State to an international organization in the commission of an internally wrongful act. The second is whether the answer to the first question should also apply to the case of direction and control or coercion exercised by a State over the commission of an act of an international

organization that would be wrongful but for the coercion. In our view, both issues are of great relevance in contemporary international affairs, and we believe that the Commission should indeed examine them. In so doing, the Commission may wish to consider the practical consequences of the possible finding that a State is responsible in both scenarios. In addition, it would be desirable to clarify whether the wrongful act referred to in the second question is an internally wrongful act or an internationally wrongful act, as this is not specified in paragraph 26 (a).

(b) Responsibility of Member States of an international organization

The final question (paragraph 26 (b)) is whether there are cases in which a State could be held responsible for the internationally wrongful act of an international organization of which it is a member. In our view, recent events, as can be observed in international and domestic litigation as well as in the academic literature, indicate that this is an issue of considerable practical significance, as the potential liability of member States has arisen for consideration on a number of occasions. The consensus in the academic literature, however, is that the legal situation is not entirely clear. Accordingly, consideration of the issue by the Commission could help to clarify the status of international law on the matter, regardless of the outcome of such consideration.

World Health Organization

Coming now to chapter III.C of the report, we note that the Commission is not requesting comments on any specific circumstance precluding wrongfulness and that the applicability of a claim of necessity to international organizations was the subject of a previous request for comments by the Commission. By way of general comment at this stage, WHO would recommend that the Special Rapporteur and the Commission bear in mind the fundamental differences between States and international organizations, and the differences of functions and purposes existing between international organizations, to assess which of the circumstances precluding wrongfulness listed in chapter V of Part One of the articles on the responsibility of States could be considered applicable to international organizations, especially taking into account the probable absence of practice in this area. For example, while it is evident that a circumstance such as self-defence is by its very nature only applicable to the actions of a State, it could be questioned whether the international obligations usually attributable to international organizations may be such that could plausibly lead to a breach of a peremptory norm of general international law under article 26 of the articles on State responsibility.

The Commission is also asking whether it should include in the draft articles the case of a State aiding or assisting an international organization in the commission of an internationally wrongful act, as well as the cases of a State directing and controlling, or coercing, an international organization in the commission of an internationally wrongful act. These are the situations envisaged in articles 16 to 18 of the articles on the responsibility of States, as noted in the report. The general reply of WHO to this question is that, to the extent that either of the three cases in question would involve the international responsibility of an international organization, it would seem logical to include that situation in the draft articles. On the basis of the structure and content of the articles on State responsibility, that would generally seem to be the case for aid or assistance, or

direction and control, by a State to an international organization in the commission of an internationally wrongful act. A different reply, however, would seem to apply to the case of an international organization being coerced by a State in the commission of an act that would be wrongful but for the coercion, since that particular situation would exclude the responsibility of the coerced organization.

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Ninth report on unilateral acts of States*

By Víctor Rodríguez Cedeño, Special Rapporteur

Draft guiding principles

In order to provide the Commission with an overview of the various draft guiding principles submitted for its consideration during this session, they are all presented below in order in a systematic fashion.

Principle 1[1]
Definition of a unilateral act

A unilateral act of a State means a unilateral declaration formulated by a State with the intent of producing certain legal effects under international law.

Addressees of unilateral acts of States
Option A

A unilateral act may be addressed to one or more States, the international community as a whole, one or more international organizations or any other entity subject to international law.

Option B

A unilateral act formulated in accordance with international law will produce legal effects, regardless of whom it was addressed to.

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* A description and analysis of the guiding principles contained in the draft will be published as an addendum to the present document.

[1] Contains two potential paragraphs: one relating to the definition itself and another concerning the addressees of the unilateral act.

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Principle 2
Capacity of States to formulate unilateral acts

Every State possesses capacity to formulate unilateral acts in accordance with international law.

Principle 3
Competence to formulate unilateral acts on behalf of the State

1. By virtue of their office, heads of State, heads of Government and ministers for foreign affairs are considered to represent their State and to have the capacity to formulate unilateral acts on its behalf.

2. In addition to the persons mentioned in the previous paragraph, other persons may be considered able to formulate unilateral acts on behalf of the State if that may be inferred from the practice followed in that regard by the formulating State and from the circumstances in which the act was formulated.

Principle 4
Subsequent confirmation of an act formulated by a person without authorization (or not qualified to do so)

A unilateral act formulated by a person not authorized (or qualified) to act on behalf of the State, in accordance with the previous guiding principles, may be confirmed subsequently by the State either expressly or through conclusive acts from which such confirmation can be clearly inferred.

Principle 5
Invalidity of an act formulated by a person not qualified to do so

A unilateral act formulated by a person not authorized or qualified to do so may be declared invalid, without prejudice to the possibility that the State from which the act was issued may confirm it in accordance with guiding principle 4.

Principle 6
Invalidity of a unilateral act that conflicts with a norm of fundamental importance to the domestic law of the State formulating it

A State that has formulated a unilateral act may not invoke as grounds for invalidity the fact that the act conflicts with its domestic law, unless it conflicts with a norm of fundamental importance to its domestic law and the contradiction is manifest.

Principle 7
Invalidity of unilateral acts

1. (a) A State that is the author of a unilateral act may not invoke error as grounds for declaring the act invalid, unless the act was formulated on the basis of an error of fact or a situation that was assumed by the State to exist at the time when the act was formulated and that fact or that situation formed an essential basis of its consent to be bound by the unilateral act.

(b) The foregoing shall not apply if the author State contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of the possibility of such an error.

2. Fraud may be invoked as grounds for declaring a unilateral act invalid if the author State was induced to formulate the act by the fraudulent conduct of another State.

3. Corruption of the representative of the State may be invoked as grounds for declaring a unilateral act invalid if the act was formulated owing to the corruption of the person formulating it.

4. Coercion of the person who formulated a unilateral act may be invoked as grounds for declaring its invalidity if that person formulated it as a result of acts or threats directed against him or her.

5. Any unilateral act formulated as a result of the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations is invalid.

6. Any unilateral act which at the time of its formulation is contrary to (or conflicts with) a peremptory norm of general international law (*jus cogens*) is invalid.

Principle 8
Termination of unilateral acts

A unilateral act may be terminated or revoked by the formulating State:

(a) If a specific time limit for termination of the act was set at the time of its formulation (or if termination was implicit following the performance of one or more acts);

(b) If the act was subject to a resolutory condition at the time of its formulation;

(c) If the subject matter of the unilateral act has ceased to exist;

(d) If there has been a fundamental change in the circumstances that prompted the formulation of the act (*rebus sic stantibus*) which renders its fulfilment impossible;

(e) If a peremptory norm of international law has emerged following its formulation which conflicts with the act.

Principle 9
Suspension of unilateral acts

A unilateral act may be suspended by the formulating State:

(a) If a circumstance that would allow for its suspension was specified at the time of its formulation;

(b) If the act was subject to a suspensive condition at the time of its formulation;

(c) If its subject matter has temporarily ceased to exist;

(d) If there has been a fundamental change in the circumstances that prompted the formulation of the act which temporarily renders its fulfilment impossible.

Principle 10
Basis for the binding nature of unilateral acts

The binding nature of the unilateral acts of States is based on the principle of good faith and the intent to be bound of the State that formulated the act.

Principle 11
Interpretation of unilateral acts

The context in which a unilateral act was formulated by a State, together with the clarity and precision of its terms, shall be given weight in interpreting it.